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Gilbert, Jérémie (2003) The treatment of territory of indigenous peoples under international law.
In: Title to territory in international law: a temporal analysis. Castellino, Joshua and Allen, Steve, eds. Law, social change and development series . Ashgate, Aldershot, pp. 199-238.
ISBN 075462224x. [Book Section]

Published version (with publisher's formatting)

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**THE TREATMENT OF TERRITORY OF INDIGENOUS PEOPLES IN
INTERNATIONAL LAW**

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**THIS PIECE WAS ORIGINALLY PUBLISHED IN *TITLE TO TERRITORY IN
INTERNATIONAL LAW*, EDITED BY J CASTELLINO AND S ALLEN:
(ASHGATE, 2003)**

7 The Treatment of Territory of Indigenous Peoples in International Law

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The history of indigenous peoples is a bloody and unfinished account of a fight to protect their lands against invaders. Since indigenous peoples' experience with international law has had, and still has, much more to do with theories of dispossession, at first glance it might seem quite ironic and paradoxical to include a chapter concerning indigenous peoples in a book dedicated to theories of acquisition in international law. Since the early developments of international law, indigenous peoples have been victims of specific interpretations of legal doctrines of acquisition of land. The making of treaties and concepts of *terra nullius* and displacement were the classical ways of dispossession, whereby indigenous territories were 'legitimately' acquired. The position of indigenous peoples in today's society is mostly a consequence of the famous doctrine of the 'three Cs', civilization, Christianization and commerce, for which international law, as the legal instrument of colonial conquest, was largely culpable. Today the position of indigenous peoples can be subsumed in one idea: they are the first inhabitants of lands they are not allowed to own or use. Their situation is an illustration of the modern development of theories concerning acquisition of land. In response to the development of anti-racist legislations and the rejection of colonialist theories, states have developed an arsenal of legal theories legitimizing acquisition of indigenous peoples' territory. In this evolution legal discourse has been an important playground for the development of theories of acquisition versus recognition and protection of fundamental rights, in which indigenous peoples' rights is a growing area.

In spite of the fact that the term 'indigenous peoples' is used in international law and generally in literature, the definition is not yet universally resolved (the term 'peoples' in international law also evades definition).¹ However, to recognize the importance of land rights within the indigenous peoples' discourse, it is vital to focus on the question of who indigenous peoples are. From a legal perspective, the

¹ For an informed discussion on those issues, see Makkonen (2000).

term 'indigenous peoples' may refer to different notions following the regional understanding of such a concept.² Although the UN system is elaborate,³ there is no clear definition of the term 'indigenous peoples'. The definition proposed by Cobo in his *Study of the Discrimination against Indigenous Peoples* is usually accepted as authoritative.⁴ The definition proposed is a mix between 'objective' criteria, such as 'historical continuity', and 'subjective' factors including self-definition. Three criteria seem to be fundamental to this definition. First, indigenous peoples are descendants of original inhabitants of territories since colonized by foreigners with culture, language, ancestry and occupation of land all constitutive evidence of continuity. Second, they have distinct cultures, which set them apart from the dominant society. And, third, they have a strong sense of self-identity.⁵

In this context land has to be accepted as a vital element of indigenous culture.⁶ Thus, the link between land and indigenous peoples is the definitive factor that distinguishes them from other populations. To understand the basic features that make different indigenous cultures, we must understand the crucial importance of the land rights issue. The misunderstanding of indigenous peoples' relationship with their homelands by non-indigenous societies is a key factor inherent in the threat of 'western' legal systems to indigenous survival. Although this relationship is based on the need to find resources, the precise characteristic of the relationship is deeper and not restricted to the physical element.⁷ In his definition, UN Special Rapporteur Cobo states:

² See Russel (1986) and also Declaration on the Rights of Asian Indigenous Peoples, adopted at the Asian Indigenous Peoples Pact General Assembly Meeting, Chiangmai, Thailand, 18–23 May 1993, in *APJHRL* 1 (2000) 165–8.

³ For a review of the UN system on indigenous peoples, see HCHR, Fact Sheet No. 9 (Rev. 1), *The Rights of Indigenous Peoples*, Programme of Activities for the International Decade of the World's Indigenous Peoples (1995–2004), General Assembly Resolution 50/157 of December 1995, Annex.

⁴ The Sub-Commission called it 'a reference work of definitive usefulness' and invited the Working Group to rely on it; see Sub-Commission Res. 1985/22, para. 4(a).

⁵ More recently, the Special Rapporteur Erica-Irene A. Daes has defined indigenous peoples on the following criteria: priority in time, voluntary perpetuation of their cultural distinctiveness, self-identification as indigenous and experience of subjugations, marginalization, dispossession, exclusion and discrimination by the dominant society; Sub-Commission on the Promotion and Protection of Human Rights, 19 July 2000, UN Doc. E/CN.4/Sub.2/2000/10.

⁶ Rouland describes the territorial issue as the 'anchorage' of the right to be different for indigenous peoples ('L'ancrage du droit à la différence: les droits territoriaux'); Rouland *et al.* (1996: 468).

⁷ In most of the indigenous cultures the land is called 'Mother Earth'; 'they do not own the land but the land (the "Mother Earth") owns them and generates them as sons'; Rouland *et al.* (1996: 468).

they form a non-dominant sector of society and are determined to preserve, develop and transmit to future generations their ancestral territories.

(Cobo 1983: para. 379)

Land is inherited from descendants and 'ownership' of traditional homelands and its transmission to future generations is a vital component of indigenousness. Thus land rights have to be viewed as an expression of tribal unity and perpetuation. Pre-colonialism, the dominant feature of ownership for the majority of indigenous peoples was collective, with its source in local indigenous customary laws that were never recognized by colonial powers and, subsequently, independent states.⁸ The negation of this customary law by non-indigenous legal systems is an important element in the possession of indigenous territory (see Sheleff 1999 and McNeil 2000).

While international law is the main subject of this discussion, the first place of redressal for indigenous peoples is before national courts. Native titles are usually granted by national legislation. This state practice, via the consent of state parties, transmits directly in international law. This chapter concentrates mainly on the study of the law governing indigenous (or 'aboriginal' or 'native') titles. An 'indigenous title' for this purpose is understood as a right to land given to a community that occupied the land at the time of colonization. Thus, the focus will be on states where indigenous populations represent an important part of the population and they have been dispossessed by colonial settlement. Based on these interlinked criteria, the situations in Canada, Australia and Scandinavia will be closely examined.

It needs to be stated at the outset that references to 'land' and 'territory' have been used alternatively. Indigenous claims are usually based on both notions. However, there is clear preference for recognition of territorial rather than land rights. A 'territory' refers to the totality of 'the environment of the areas which the peoples concerned occupy or otherwise use',⁹ which is a broader concept than merely the land.¹⁰

⁸ Recognition of such customary systems is a difficult feature for states. For example, Danish juridical expeditions to Greenland in charge of determining 'how far it was possible to introduce unity of law between Denmark and Greenland' concluded that indigenous customary law 'is not a closed system such as a modern dogmatically defined system of law. Customary law is a "living law", not written law. Data gathering must be concerned with the whole cultural context'; as quoted in Craig and Freeland (1998: 8).

⁹ ILO Convention 169 is the only instrument that refers to such a distinction. Article 13 states that the 'use of the term "lands" . . . shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169, 72, *ILO Official Bull.* 59 (1989). See also Assies (1998: 15).

¹⁰ However, use of the plural in the expression 'rights to land' refers to the total issue of rights to land including traditional rights to enjoy fishing and/or hunting, as well as rights to the protection of the land in general. Thus, the notion of territory is mainly a reference to a right to manage land.

Nevertheless, since international law and national laws usually refer to both terms without distinction,¹¹ references to both concepts are necessary. However, since indigenous peoples claim the right to own land as well as rights to manage and own their natural resources, it is important to keep in mind the implications of 'territory' in understanding indigenous claims.

The issues of land, territory and resources are clearly related to the right of self-determination since the ultimate purpose of territorial rights includes the right to own and manage land with maximum liberty. While a focus on the issue of self-determination alone would not be a complete representation of the debate concerning land rights it is nonetheless important to recognize the 'shadow' that self-determination casts on a discussion about indigenous land rights.¹² In this regard, the issue of indigenous peoples' rights to land is often regarded as a question of 'internal self-determination' rather than an issue relating to international boundary disputes.¹³

Law and Indigenous Land Rights

The legal environment of the conquest of indigenous territories was one where colonial powers developed theories in favour of a right to dispossess. These doctrines of discovery and unequal treaties between indigenous peoples and invaders were used to legitimate acquisition of indigenous lands. While *terra nullius* is no longer recognized as a legal tool for acquiring indigenous peoples' lands,¹⁴ it was historically a vital legal doctrine, justifying dispossession of indigenous peoples.

The 'Valladolid controversy' is a well-known example of the development of theories justifying the right to dispossess indigenous peoples.¹⁵ With the 'three Cs' theory forming its main thrust, the Catholic Church is severely implicated in this dispossession.¹⁶

¹¹ For an example of the alternative use of the two notions, see the Draft Declaration on the Rights of Indigenous Peoples, Preamble UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

¹² For discussions on the right to self-determination for indigenous peoples, see Aikio and Scheinin (2000) and Maivân Clech Lãm (2000).

¹³ Internal self-determination is 'referring to the internal political and economic organization of a people, without necessarily affecting already existing external relations'; Stavenhagen (1994): 20).

¹⁴ See *Western Sahara case*, ICJ Reports (1975) 12 at 16 and High Court of Australia, *Mabo v. Queensland* (1992) 175 C.L.R. 1.

¹⁵ The 'Valladolid controversy' was a discussion between Sepulveda and Las Casas in 1550. The issue of the 'scientific' debate between those two 'scientists' was to define whether the 'Indians' of the South American colonies were some 'natural inferior human' or not. For a general review of all the legal doctrines of those times, see Rouland *et al.* (1996: ch. 3).

¹⁶ A good example is the *Inter Caetera* bull from Pope Alexander VI which, in the name of the development of Christianity, shared the world between Portugal and Spain; see Henderson (1997).

Traditionally, the Christianization of indigenous peoples provided a doctrinal basis for non-recognition of the sacred importance of the land. As Scheinin writes:

the essentially Christian-based approach to the practice of religion fails to address indigenous beliefs that treat the land itself as sacred, not merely a piece of property suitable for certain isolated religious practice.

(Scheinin 1999: 5)

Nevertheless, fulfilment of these elaborate theories was only achieved through military domination or by fraudulent perpetration of unequal treaties (Daes 2000: 10–11). Later legal justification of indigenous dispossession was based on notions of *terra nullius* and discovery (see Chapters 1–3), interpreted in a racist manner. It is now accepted that such legal theory was merely the handmaiden of the perpetration of European political ambition,¹⁷ and the international community has recognized these theories as blatantly racist and illegitimate,¹⁸ though they continue to be discussed before national courts.¹⁹ Modern state-building had direct consequences for proprietary rights of indigenous peoples. As highlighted by Makkonen:

although the vast majority of the world's about 190 states are . . . polyethnic, most of them retain nation-statal ideas and do not formally recognize their internal diversity.

(Makkonen 2000: 32)

In this process, non-recognition of indigenous peoples' rights to own land collectively is part of the process of assimilation as states seek to create a homogeneous society. In some states indigenous peoples have no right to own land irrespective of dispossession.²⁰ In countries where they have the right to occupy traditional lands, indigenous peoples are usually perceived as using public or national lands as a 'gift' from the government. In the British Commonwealth system though, indigenous peoples have exclusive use and occupancy of land though the respective governments are its owners. Thus even when indigenous peoples have a legal right to their lands this right is subject to the legal theory of 'the power to extinguish'. States have always had the power to extinguish if they perceive the 'need'. In this sense Special Rapporteur Daes (2000: 14, para. 40) states that the concept of aboriginal title is itself discriminatory since 'it provides only

¹⁷ An illustration of such hypocritical theory was the right of white settlers in Tasmania to shoot aborigines, after whose decimation the island could factually have been 'terra nullius'.

¹⁸ *Eastern Greenland decision*, PCIJ (1993) and the *Western Sahara case*, ICJ Reports (1975) 12.

¹⁹ See the discussion below about the *Mabo* decision in Australia.

²⁰ Daes (2000: 36) states 'One of the most widespread contemporary problems is the failure of States to recognize the existence of indigenous land use, occupancy and ownership, and the failure to accord appropriate legal status and legal rights to protect this use, occupancy and ownership.'

defective, vulnerable and inferior legal status for indigenous land and resource ownership'. Thus, although *terra nullius* has been deemed racist, at present there are still legal frameworks that allow states to discriminate vis-à-vis indigenous land rights.

The right of expropriation is recognized by international law, but the power to extinguish a title is very different. Extinguishment of such indigenous titles is usually at the behest of grants of such territory to non-indigenous holders. If the indigenous right to land is 'inconsistent' with the grant given to non-indigenous holders, such a grant would 'extinguish' the indigenous right. This right to extinguish usually allows states to take land without compensation.²¹ Indigenous peoples remain, in most instances, the only part of society that can be victims of the 'extinguishing' of their right to their lands. As observed by Sambo:

... the ongoing implementation of state extinguishment policies constitutes a very serious threat to indigenous societies. It is another relic of colonialism. Extinguishment is used to ensure state domination of indigenous peoples and to serve their ancestral ties to their own territories.

(Sambo 1993: 31)

US Supreme Court Judges echo these sentiments:

No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.²²

Via this decision taken in 1995 the Supreme Court recognized that the government is entitled to take Indian land without due process or compensation in direct contravention of the constitution. This decision is a direct consequence of the legal theory of 'plenary power' that allows the possibility for state control of the use of the land 'without regard for constitutional limits on governmental power that would otherwise be applicable' (Daes 2000: 16, para. 47). Thus the theory of plenary power differs marginally from the theory of extinguishments in that it requires prescribed legal procedures to be fulfilled. Nevertheless, both 'legal' theories are discriminatory and it is difficult to understand how such practices are used in states such as Canada, Australia and the USA in clear violation of basic human rights.²³ Even when land agreements

²¹ Usually extinguishments can only be made by a governmental Act requiring 'clear and plain intention'.

²² *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1995), quoted in Daes (2000: 15).

²³ CERD has commented on this issue, see p. 224.

are based on treaties between indigenous peoples and states, governments often deny effect to these, violating them in the absence of legal remedies (see Brownlie 1992). The Special Rapporteur on the issue of indigenous peoples and their relationship to land, highlights that

[It] is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of States.

(Daes 2000: 9)

Removals or relocations of indigenous peoples were often effected as practical expression of such agendas and were often justified as a solution for 'overpopulation, need for resettlement, transmigration, resources exploitation and security' (ibid.). There are many examples of forced relocation of indigenous peoples because of 'developmental' projects that include dam construction, eucalyptus tree plantations, and so on.²⁴ States can be deemed responsible for the threat to indigenous peoples' lands by implementing policies such as settlement programmes on indigenous lands. For instance, the current Chiapas uprising in Mexico stems from the question of land ownership and is a direct result of repeated governmental policy over the last fifty years including governmental encouragement of mass migration to the region and displacement policies towards indigenous populations (see Wilson 1998).

International Legal Regimes and the Protection of Indigenous Land Rights

Having previously been an instrument in effect putting colonialism on a legal footing, international law is shifting to give voice to the victims of a legal system based on 'western concepts'.²⁵ It was only during the 1970s that international human rights law rejected its assimilationist approach and started to recognize their unique existence and specific culture.²⁶ Modern international law seeks to protect the right of indigenous peoples to land in two ways: first, through specific instruments that especially deal with such an issue and, second, via instruments that do not specifically deal with the

²⁴ For examples of 'developmental' projects and their effects, see 'Refuge, Canada's periodical on Refugees', *Environmental Refugees* 12(1) (June 1992).

²⁵ The first international instrument that gave protection to indigenous peoples is the 'Covenant of the League of Nations'; art. 23 requires just treatment for native inhabitants in territories under the control of members of the League. For a chronology of international instruments relating to indigenous peoples, see Havemann (1999a: 19).

²⁶ International human rights law usually regarded 'indigenous peoples' as 'minorities' entitled to general minority rights protection. The first document distinguishing the two notions is the Report of the Special Rapporteur on the Problem of Discrimination against Indigenous Populations (1972).

right to land, but which give opportunities to mobilize other existing recognized rights to protect indigenous rights to land. In this regard, the interpretation of existing rights to include indigenous peoples' right to land is an important feature of existing international law. The next section explores the major instruments of international human rights law that contain these specific references to the land right issue.²⁷

UN and Indigenous Peoples' Rights to Land

The UN General Assembly has proclaimed the International Decade of the World's Indigenous Peoples (1994–2004).²⁸ One of the purposes of this decade is the adoption of the 'Draft Declaration on the Rights of Indigenous Peoples'. This declaration, proposed by the Working Group on Indigenous Populations in 1993,²⁹ was rejected by the Commission on Human Rights (CHR) comprising state representatives. However, the commission is presently discussing adoption of the draft declaration³⁰ with amendments amenable to its members. This instrument seeks to strike:

... a balance between the right of indigenous peoples to be different and to control their own affairs, and their right to participate fully in the wider society.

(Burger 1998: 10)

The spirit of the draft declaration is one of invitation to governments to base their relationship with indigenous communities and individuals on consent. In this regard, it deals with a wide range of issues including language rights, education, health and employment. Article 10 of the declaration, dealing with land rights, states:

Indigenous Peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and, where possible, with the option of return.³¹

In addition, art. 25 recognizes spiritual and material relationships of indigenous peoples with their homelands and highlights that 'land and territories' include the

²⁷ For a review of the instruments that might be applicable to indigenous peoples, see Daes (2000: Annex).

²⁸ See CHR, International Decade for the World's Indigenous People: Activities Undertaken Within the United Nations System in Preparation for the Decade, UN Doc. E/CN.4/1997/101. Within the UN agenda, 1993 was declared the International Year for the World's Indigenous Peoples.

²⁹ The preliminary text of the draft declaration was issued in 1985.

³⁰ The Working Group of the CHR is in charge of redrafting; see Working Group of the Commission on the Draft Declaration Report, UN Doc. E/CN.4/2002/85.

³¹ Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

whole environment of 'lands, air, waters, coastal seas, sea-ice, flora, fauna and other resources'. Article 26 then refers to 'the right to own, develop, control and use the lands and territories . . . which they have traditionally owned or otherwise occupied or used'. States have objected to the use of the past tense and some are more in favour of the formula used by the ILO Convention that only deals with land that remains in use.³² Where the return of land is not a possibility, indigenous peoples would have the right to just and fair compensation, as enshrined in art. 27. In general, all the articles referring to land rights also recognize collective ownership of land and invite state governments to take into account and respect indigenous traditions, customs and land tenure systems. It is important to bear in mind that this document was produced by a body of human rights experts with significant participation by indigenous representatives. The final declaration is likely to be severely restrictive, since it has to be adopted by the CHR comprising state representatives. During discussions thus far, state concern has centred on the protection of national land tenure systems, state ownership of minerals and state power to expropriate.³³ It is also important to stress that declarations are statements of purpose rather than legally binding documents. However, with the theoretical deadline for its adoption looming and with fundamental differences still remaining it is unlikely to be passed within the timeframe. In a recent debate of the Working Group for the CHR, Canada asked for an amendment to the draft stressing a distinction between 'lands' and 'territories' and clarification between 'traditional use' and 'property'³⁴ arguing that the wording was 'too prescriptive' with regard to conflicts of laws.³⁵ The Australian representatives too expressed reservations with the drafting of the declaration, whilst Guatemala called for an agreement of norms governing the concept of indigenous peoples, recognition of collective rights, self-determination and land rights before discussing the articles. Although the issue of land and resources is recognized as vital by all governments, their positions with regard to the provisions of the draft declaration vary considerably.

The first indigenous claim before an international body took place during the 1920s,³⁶ but the UN showed direct interest in indigenous issues only in the 1970s with the Sub-Commission on Protection of Minorities initiating a study of the problem of

³² See Barsh (1996: 801). The countries concerned are Australia, Canada and the USA.

³³ On the formulation of land rights (arts. 26 and 27) only Colombia found such formulation 'acceptable in principle', whereas most of the states found it 'objectionable in parts'.

³⁴ For more information about the actual debate on the adoption of the draft declaration, see Indigenous Peoples' Centre for Documentation, Research and Information, <<http://www.docip.org>>, visited 23/04/01.

³⁵ Update No. 37, January/March 2001, Working Group on the Draft Declaration, Geneva, 6th session, 20 November–1 December 2000.

³⁶ The Iroquois Chief Deskaheh was the first indigenous 'activist' at international level, spending several months lobbying the League of the Nations in 1923.

discrimination against indigenous populations.³⁷ In 1982 it created the Working Group on Indigenous Populations as its subsidiary organ.³⁸ Since then, this working group has collected comments and suggestions concerning the draft declaration from hundreds of indigenous groups, NGOs, IGOs and governments (see Schulte-Tenckhoff 1997). The first study especially dealing with land issues followed the first draft of the declaration in the 1990s. It was only in 1997 that the CHR appointed Ms Daes as Special Rapporteur 'to prepare a working paper on indigenous people and their relationship to land with a view to suggesting practical measures to address ongoing problems in that regard'. The Special Rapporteur completed her preliminary working paper in 1997 examining the facilitation of understanding of the provisions relevant to land rights contained in the draft declaration.³⁹ Examining state perspectives on the issues, she found that their prime objection related to the difficulty of reconciling indigenous land claims with the need for 'certainty and security' of land titles. Another difficulty was the manner in which indigenous land regimes could be integrated with the 'goal of a functional and stable nation-state'. The final working paper was submitted in 2001 even though only four states (Canada, Australia, New Zealand and Denmark) submitted comments and information, with South American and Asian states refusing to participate.

This paper is certainly the most complete work on the subject produced on behalf of the UN and more generally in international law. The report analyses the importance of the indigenous peoples' relation with their homelands and explores the contemporary problems faced by indigenous peoples in such a relationship.

ILO: The Only Binding Protection

The International Labour Organization (ILO) has adopted two Conventions on Indigenous and Tribal Peoples (Convention 107 and 169)⁴⁰ which protect the lands of indigenous peoples.⁴¹ In this regard the ILO became active in this field long before the UN (Heintze 1993). In fact the ILO began to address indigenous peoples' issues through the rights of native workers in 1921 (the ILO was created in 1919). Its most

³⁷ See the series of documents prepared by Special Rapporteur Cobo between 1973 and 1984, Cobo (1983 and 1986/7).

³⁸ The Working Group on Indigenous Populations is composed of five members who are independent experts of the Sub-Commission.

³⁹ See Preliminary Working Paper prepared by Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1997/17, 20 June 1997 and Corr. 1.

⁴⁰ The ILO adopted Convention No. 107 in 1957 and Convention No. 169 in 1989. For an overview of the ILO system, see Swepston (1998).

⁴¹ It must be emphasized that some indigenous representatives were unhappy with the lack of consultation and have invited states not to ratify this convention; see 'Resolution of the Indigenous Peoples', Preparatory Meeting Relating to the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 28 July 1989.

significant contribution on indigenous issues was the adoption of Convention No. 169 (1989) revealing the organization as the cutting-edge for expression of indigenous concerns. This convention deals with a range of different issues and includes the land rights issue. Even though at first glance it could seem paradoxical that an organization dedicated to workers' rights has produced a convention referring to indigenous land rights, today the Convention Concerning Indigenous and Tribal Peoples in Independent Countries⁴² remains the only universal binding standard on indigenous land rights. This convention recognizes the collective character of the relationship of indigenous peoples with their land, especially noting its spiritual and cultural importance.⁴³ At least nine of its 44 articles clearly deal with the land issue with the entire second part specifically dedicated to the right to land.⁴⁴ Article 14, in particular, contains a fundamental expression of indigenous rights to land:

The right of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.

Use of the word 'recognize' implicitly suggests that the occupation of the land by indigenous peoples gives a right to possession that must be 'recognized' by the state. This underscores the ILO Committee of Experts statement that the convention does not necessarily require 'full title', as long as 'possession is secure'.⁴⁵ Article 14(3) invites governments to take necessary steps to identify lands which indigenous peoples traditionally occupied, guarantee effective protection of ownership and possessory rights and to take adequate procedures within domestic jurisdiction to resolve land claims. Since no reference is made to temporal limitations, these procedures could arguably also include past claims. In this context Anaya has commented that this article is:

... a response to the historical processes that have afflicted indigenous peoples, processes that have trampled on their cultural attachment to ancestral lands, disregarded or minimized their legitimate property interests, and left them without adequate means of subsistence.
(Anaya 1996: 106)

Article 16 expresses the prohibition of removal of peoples from lands and seeks creation of minimum legal standards for 'relocation'. Article 16(2) stresses the fundamental

⁴² Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169, 72 *ILO Official Bull.* 59, 1989, see especially arts. 4 and 7.

⁴³ For example, art. 13(1) states 'In applying the provisions of this Part of the Convention Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.'

⁴⁴ See arts. 4, 7, 13, 14, 15, 16, 17, 18 and 19.

⁴⁵ Swepston (1998: 25); see 'Observation by the Committee of Experts', 1995 (Norway) para. 17.

conditions necessary in relocation, including consent and that such relocation must only be an exceptional measure. In discussing the nature of 'necessary relocation', the conference resisted specific definition so as not to pre-empt such action.⁴⁶ Swepston (1998) suggests that the ILO has tried to set up 'a series of hurdles to be passed, with public hearings as insurance against abuse' in case of relocation. He concedes that whilst this does not always prevent abuse it marginally diminishes the risk. However, one of the most positive aspects of art. 16 is the recognition of the 'right to return' when the reason for removal ceases.

This convention is also the only legally binding international instrument that acknowledges recognition of indigenous land tenure systems and customs relating to the transmission of land that had been rejected by the forces of colonization (art. 17). A big impediment to the ILO system, however, remains the manner in which the convention is monitored. The submission of reports by states does not enable indigenous peoples to submit complaints – a fundamental flaw that weakens the effectiveness of the convention as a means of providing redress (Brölmann, Lefebvre and Zieck 1993: 212).

The Proposed American Declaration on the Rights of Indigenous Peoples specifically deals with the right to land.⁴⁷ This is recognized in the preamble (para. 5):

... in many indigenous cultures, traditional collective systems for control and use of land, territory and resources ... are a necessary condition for their survival ... and ... the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the states in which they live.

This proposed declaration highlights that ownership of traditional lands is part of the 'right to cultural integrity' of indigenous peoples. Article VII states that indigenous communities are entitled to 'restitution in respect of the property of which they have been dispossessed.'⁴⁸ According to art. XVIII 'Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.' However, the document has no binding effects and remains a draft declaration. Thus, its contents are liable to change considerably before its possible adoption.

⁴⁶ Special Rapporteur Daes highlights that 'justification for relocations included overpopulation, need for resettlement, transmigration, resource exploitation and security'; see UN. Doc. E/CN.4/Sub.2/2000/25, p. 23.

⁴⁷ 'Proposed American Declaration on the Rights of Indigenous Peoples', approved by the IACHR on 26 February 1997 at its 1333rd session, 95th Regular Session, published in Annual Report of the IACHR (1996) p. 633.

⁴⁸ Article VII, para. 2, also adds that where such restitution is 'not possible, compensation on a basis not less favourable than the standard of international law' is required.

The appropriation or degradation of indigenous peoples' homelands is a continuing threat to their survival, therefore violating basic human rights such as the right to life or physical integrity of the person. The aim of the following section is to consider whether human rights law is able to protect indigenous peoples' relationship to their homelands in the face of these consequences.

The HRC

There is no specific article dealing with indigenous peoples in the International Covenant on Civil and Political Rights (ICCPR).⁴⁹ Nevertheless the HRC, the monitoring organ of this covenant, has often dealt with indigenous issues within the framework offered to minority rights. In its General Comment on art. 27, the HRC has stated that under the exercise of cultural rights protected by art. 27 of the ICCPR:

... one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true ... of indigenous communities constituting a minority ...

With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous Peoples.⁵⁰

Optional Protocol I to the covenant gives competence to the HRC to receive and consider communication from individuals claiming rights violation of the covenant.⁵¹ Even though the committee does not have any implementation mechanism, its decisions are important in terms of codification and evolution of international human rights law. Article 27 of the covenant recognizes that minorities 'shall not be denied the right, in community with other members of their group, to enjoy their own culture'. On the basis of such protection the chief of a Canadian native Indian tribe, the Lubicon Lake Band, claimed that Alberta's provincial government violated his right to enjoy his culture by expropriating part of the Band's territories to allow petrol extraction. The applicant especially emphasized that this exploration destroyed traditional hunting and trapping territory and put their livelihood and subsistence in jeopardy.⁵² The federal Canadian government was concerned since it had allowed the provincial Alberta

⁴⁹ ICCPR (1966), G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

⁵⁰ HRC, 'General Comments' No. 23 (50) on art. 27, Minority Rights, 6–4, 1994, paras. 3.2 and 7.

⁵¹ Optional Protocol of the ICCPR, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 UNTS 302, entered into force, 23 March 1976, Article I.

⁵² Communication n° 167/1984, Report of the HRC (A/45/40), vol. 2, annex IX A; CCPR/C/OP/2, para. 3.5.

government to expropriate the territory of the Band for the benefit of private corporate interests. The committee found that those concessions were in breach of art. 27 and condemned the government to pay some indemnity.⁵³

The committee has received other similar claims.⁵⁴ In *Länsmann et al. v. Finland*, it stated that the right to enjoy one's culture could not be determined away from its context. This decision supports governments in allowing exploitation of natural resources or other economic activities in traditional indigenous territories, but establishes that these activities must not infringe too much upon indigenous peoples' way of life. In this case, permission to quarry and transport stones into indigenous territory was found not to be in breach of art. 27. Nevertheless, the committee stated that depending on the level of activities involved, such authorization 'may constitute a violation of the author's rights under Article 27, in particular of their right to enjoy their own culture'.⁵⁵

Until Namibia's declaration of independence in 1990, the Rehoboth Baster community had traditionally owned and controlled their homelands. Nevertheless, Namibia's new constitution states that all property or control over property comes under the jurisdiction of the government of Namibia. The late Captain of the community and others claimed before the HRC that such legislation violated their right, as entrusted by art. 27 of the ICCPR, since the land was used by the community for grazing cattle and cattle raising was 'an essential element in the culture of the community'.⁵⁶ The committee rejected their claim of violation on the basis that the applicants failed to prove that the community relationship with their traditional land was at the base of their distinctive culture. This decision was based primarily on the fact that the authors defined their culture 'almost solely in terms of the economic activity of grazing cattle'.⁵⁷ Thus, since their claim was based on economic rather cultural grounds the protection offered by art. 27 was denied.

In *Hopu et al. v. France*, the committee was asked to address the claims of two indigenous Polynesians from Tahiti following a decision allowing construction of a hotel on the site of their ancestral cemetery. They alleged that the project was a violation of their right to privacy and family life.⁵⁸ The HRC stated that the covenant required broad interpretation of the term 'family' to include those comprising 'the family' as

⁵³ Communication n° 167/1984, Report of the HRC (A/45/40), vol. 2, annex IX A; CCPR/C/OP/2.

⁵⁴ See *Sara et al. v. Finland*, Communication No. 511/1992, UN GAOR, 52nd Sess., UN Doc. CCPR/C/58/D/511/1992; *Kitok v. Sweden*, Communication No. 197/1985 (1988).

⁵⁵ *I. Länsman et al. v. Finland*, paras. 9.6 and 9.8, Communication No. 511/1992, UN-Doc. CCPR/C/52/D/511/1992 (1993).

⁵⁶ *J. G. A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (6 September 2000), para. 10.6.

⁵⁷ Individual opinion of Evatt, E. and Quiroga, C. M. (concurring).

⁵⁸ *Hopu et al. v. France*, Communication No. 671/1995, UN GAOR, 58th Sess., UN Doc. CCPR/C/58/D/671/1995.

understood in the society in question. Taking into account the specific situation, it concurred with the authors' claims that they considered their relationship to their ancestors an essential element of their identity with an important role in their family life.⁵⁹

In conclusion, it can be stated that the HRC is sensitive to the importance of the land rights issue for indigenous peoples, even though there is no specific provision in the ICCPR. The committee has developed the idea that such protection comes under notions of rights protecting minority cultures and individual family life. This posits legal recognition that, in human rights protection, culture and family life are two important aspects of indigenous peoples' relationship with their traditional homelands.

The CERD

Article 5 of the International Convention on the Elimination of All Forms of Discrimination requires equality before law in the enjoyment of various rights, without distinction of race, colour, national or ethnic origin. This entitlement also refers to the right to own property individually and in association with others.⁶⁰ The CERD monitors compliance by state parties to the convention. General Recommendation XXIII(51) of the committee deals specifically with indigenous peoples and focuses on the right to land, clearly stating that disrespect of such a right is the basis of discrimination against indigenous peoples. Highlighting the importance of the right to restitution, it calls on state parties to recognize and protect indigenous peoples' right to own, develop, control and use communal territories. In addition, it calls upon states to take steps to return territories that were taken away without free and informed consent. Dealing with restitution it states:

Only when this [return] is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁶¹

The monitoring mechanism under art. 9 of the convention has been occasionally successful in dealing with these issues.⁶² Australia, for example, has been called on to justify the content of its legislation concerning discriminatory aspects with regard to indigenous rights to land.⁶³

⁵⁹ *Hopu et al. v. France*, para. 10.3. Nevertheless, the fact that France has made a reservation on art. 27 of the ICCPR must be taken into consideration in such a solution.

⁶⁰ *International Convention for the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, reprinted in *ILM* 352 (1966), art. 5 (d)(v).

⁶¹ CERD, General Recommendation XXIII (51) on the Rights of Indigenous Peoples, adopted at the committee's 1235th meeting, 18 August 1997, §5.

⁶² For comments on this reporting procedure, see Steiner and Alston (2000: 773–8).

⁶³ See Reports Submitted by States Parties under art. 9 of the convention, *Twelfth periodic reports of State Parties due in 1998, Australia*, UN Doc. CERD/C/335/Add.2, 14 December 1999.

The IACHR

The Inter-American Commission on Human Rights (IACHR) has appreciated the connection between indigenous lands and indigenous survival in several cases (see Davis 1988). However, two cases are particularly good illustrations of the IACHR's position on this issue. The first case followed a petition submitted on behalf of the 'Yanomami Indians' of Brazil. They alleged that the Brazilian government had violated their rights to life and health by constructing a highway through their territory, authorizing exploitation of their territorial resources and the subsequent intrusion of outsiders carrying contagious diseases into their territory. The commission found that because the government permitted this intrusion without providing medical care, there was a violation of the American convention.⁶⁴ Following a petition on behalf of the 'Huarani people', the IACHR examined the human rights situation in Ecuador.⁶⁵ This petition alleged that the Huarani were under imminent threat of profound human rights violations due to planned oil exploitation activities within their traditional lands. Historically, during the colonization of Ecuador, the Huarani were centralized in a small area on the western edge of their traditional land call the 'Oriente' – officially designated a 'protected zone'. But following the discovery of oil in the region, the land was transformed into wasteland. The claim before the commission asserted that the effects of oil development and exploitation have not only damaged the environment, but also directly impaired the Huarani's right to physical and cultural survival as a people. Following that claim, the commission in its report highlighted the need for adequate protective measures before the damage and recommended that:

... the State take the measures necessary ... to restrict settlers to areas which do not infringe upon the ability of indigenous peoples to preserve their traditional culture.⁶⁶

It is important to note, in the above cases, that the IACHR referred to specific rights, for example, the right to life and the right to health, to condemn violations of indigenous land rights. This emphasizes the lack of specific and adequate tools to protect indigenous peoples' specific relationship with their homelands.⁶⁷

⁶⁴ *Yanomami Indian case*, Case 7615, IACHR 24, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

⁶⁵ IACHR, 'Report on the Situation of Human Rights in Ecuador', OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, Chap. IX, 24 April 1997.

⁶⁶ *Ibid.*: 12.

⁶⁷ A new case submitted to the court by the commission on behalf of the Mayana (Sumo) Awas Tingni Community concerns alleged violation of arts. 1 (Obligation to Respect Rights), 2 (Domestic Legal Effect), 21 (Right to Private Property) and 25 (Judicial Protection) due to the failure of the state to demarcate and officially recognize the territory of the community. This case is currently in its preliminary objections phase.

Indigenous Land Rights and State Practice: Towards Customary International Law?

Customary international law is a vital source of law that is accessible to international courts⁶⁸ and national jurisdictions. To accede to the status of international custom, a norm must fulfil two criteria. First, the *opinio juris* criteria or the belief that a norm is accepted as law and, second, evidence of general state practice.⁶⁹

Looking at the numerous activities that come under the umbrella of the UN, namely the Working Group on Indigenous Populations, the declaration of the Indigenous Decade, the work of the World Council of Indigenous Peoples and the Draft Declaration of the Rights of Indigenous Peoples, it can be argued that there is an existing international custom relating to indigenous peoples' rights to land. In the words of Bennett and Powell:

... on their own; these activities are not sufficient to constitute international custom, but, when taken in combination with state practice and the 1989 Convention on Indigenous and Tribal Peoples, they go to demonstrate a steadily broadening consensus that aboriginal title is a rule of customary international law.

(1999: 64)

Anaya observes that all the different documents and instruments relating to indigenous peoples at international level express the existence of customary international law protecting indigenous peoples. Thus a large majority of the norms contained in ILO Convention No. 169 are expressions of customary international law (Anaya 1996: 49–58, 107). All the documents examined above contain specific provisions relating to land rights and thus it could be argued that recognition of the importance of the ownership of homelands could accede to customary international law. However, as noted above, one of the fundamental elements of such customary international law is to be found in state practice. This practice needs to be demonstrated in the actions of concerned states (see Malanczuk 1997: 39). Some state constitutions do make reference to indigenous peoples' rights.⁷⁰ Australia, Ecuador, Venezuela and Norway have included or are in the process of including rights to collective ownership of the land. In other countries, such rights are guaranteed by treaties.⁷¹ National judicial

⁶⁸ See the Statute of the ICJ, art. 38(1), the court shall apply: 'international custom, as evidence of a general practice accepted as law'.

⁶⁹ See *North Sea continental shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ Reports (1969) 3 at 44.

⁷⁰ See Canada, s. 35(1) of the Constitution Act 1982; Chile, art. 123; Brazil, art. 231; Panama, art. 123; Guatemala, art. 67; Peru, art. 88, Philippines, s. 22, art. II, s. 5, art. XII and s. 6, art. XIII.

⁷¹ The USA and Norway; other states recognize such rights by local legislation, for example Ecuador, New Zealand and Venezuela.

decisions have also to be taken into consideration to appreciate the existence of customary international law. For example, Judge Brennan who sat on the *Mabo* case in Australia stated:

It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which . . . denies [indigenous inhabitants] a right to occupy their traditional lands.⁷²

This quote shows that the judge has belief, or the *opinio juris*, that there is a fundamental rule in international law, applicable domestically, which states that it is illegal and discriminatory to deny indigenous peoples the right to occupy their traditional lands.

To appreciate state practice relating to indigenous rights to land, the study of legislation and judicial decisions in Canada and Australia provides an interesting insight since both states have a long and difficult relationship with indigenous populations within their jurisdictions. Further, the land rights issues in both states are in the mainstream of domestic political agendas. Thus, the purpose of the following section is twofold: first, to provide examples of the relationship between law and the right to land for indigenous peoples and, second, to demonstrate that there is emerging customary international law concerning the importance of the land rights issue for survival of indigenous peoples.

Canada

There are approximately one million aboriginal peoples in Canada,⁷³ descendants of the first inhabitants of North America who arrived some 12 000 years ago (Elliott 1997). Canada has a long history of dialogue with aboriginal peoples. While this dialogue was not always based on a respect for aboriginal cultures, aboriginal peoples have sometimes recognized the British Crown and have exchanged their lands for protection by the Crown. Even though, as elsewhere, there was a large process of assimilation, ethnocentricity and colonial politics, the Crown tried to recognize aboriginal peoples' customs and laws in relation to their lands. Indeed, legislation concerning native peoples has been part of the federal remit since 1867. This legislative and executive relationship can be classified into three different periods of time (ibid.: 19–22). The first period was based on the 1763 Royal Proclamation. During that time for aboriginal rights to be acknowledged they were submitted to formal governmental recognition. Thus, land rights were dependent on legislative or executive recognition, which provided legal justification for the reservations. The second phase of legal relationships between Canada and aboriginal peoples involved the 'occupancy and

⁷² High Court of Australia, *Mabo v. Queensland* (1992) 175 C.L.R. 1 at 29.

⁷³ In the Canadian legal system the term 'aboriginal peoples' is used. Such a notion refers to the same group as indigenous peoples in international law.

use approach'. This approach was based on recognition of aboriginal occupancy and use of land by the common law system after the European invasion. The third phase is characterized by 'the land and societies approach'. In terms of the evolution of legislative and judicial approaches to indigenous land rights, this period from 1973–96 was crucial to the establishment of the theory dealing with aboriginal land rights in Canada.

The case of *Guerin v. R.*⁷⁴ suggested that aboriginal titles did not depend only on a royal proclamation, but derived from common law recognition of aboriginal occupancy and use of the land prior to European settlement. In this regard, *Calder*,⁷⁵ the decision that recognized aboriginal rights as *sui generis* rights, is at the 'foundation' of the movement to rethink the relation between Canada and aborigines (Asch 1999). However, on the issue of the extinguishments of native titles, the court said, in a split decision (4 : 3) that such rights could be extinguished by general rather than specific legislation.

The repatriation of the Canadian constitution from London to Ottawa in 1982 offered aborigines an opportunity to claim more legal recognition. This resulted in s. 35(1) of the Constitution Act 1982 that states that 'existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'.⁷⁶ This section of the constitutional act transfers aboriginal rights from common to constitutional law. Prior to this Act, the Canadian parliament had the power to 'extinguish' natives' rights and titles, a possibility aborted by s. 35(1) of the 1982 Act. While it is still possible to extinguish native rights this can only be fulfilled with the consent of aboriginal peoples. Nevertheless even though the Act states that aboriginal rights are constitutionally protected, it does not discuss any substantive content of those rights.

The *Sparrow* case⁷⁷ was the first in which the Supreme Court was invited to examine the contents of s. 35(1). In this decision the Supreme Court interpreted the meaning of 'existing aboriginal rights' as stated in the Constitution Act as rights that existed when the Act was passed. However, it added that 'existing aboriginal rights must be interpreted flexibly so as to permit their evolution over time'. The court added that such a position suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'. This position rejected a 'frozen rights' approach as incompatible with the meaning of s. 35. In fact, this means that Canada offers constitutional protection not only to practices and customs of aboriginal cultures that pre-dated the arrival of European colonizers but also to contemporary expression of such cultures.⁷⁸ The judgment also established how the rights protected by s. 35(1)

⁷⁴ *Guerin v. R.*, 2 SCR (1984) 335.

⁷⁵ *Calder et al. v. Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

⁷⁶ Section 35(3) adds: 'For greater certainty, in subsection 1 "treaty rights" includes rights that now exist by way of land claim agreements that may be so acquired.'

⁷⁷ *R. v. Sparrow* (1990) 70 DLR (4th) 289 (SCC).

⁷⁸ Such affirmation closed the debate on the question of the impact of the French law governing property in Québec; see *R v. Côté*, 3 SRC (1996) 139–98.

could be extinguished. In this decision the court ruled that aboriginal rights are 'not absolute'. Thus if the government decided there is need to infringe upon such rights and if this is justified by needs of society, it can infringe on those constitutionally recognized rights. The Supreme Court has set up a strict test for such extinguishments. For the court, s. 35 provides 'unextinguished aboriginal rights with constitutional protection against legislative infringement' (McNeil 1997a: 1–8). Thus, the government would have to prove it has valid grounds to extinguish and that it has a valid legislative objective respecting the fiduciary duty of the Crown regarding aboriginal peoples.⁷⁹ This judgment is part of the theory of the 'fiduciary duty' of the government to allow aboriginal peoples to use unoccupied land until it is required for alternative use. To appreciate if the government had 'plain and clear intention' to extinguish the aboriginal right, the judicial system applies a two-part test. The first part of the test is based on an assessment of whether legislation would infringe existing aboriginal rights and whether such infringement was reasonable. Second, it would determine whether the infringement is justifiable on any grounds.

Another legal episode, from a lower court of British Columbia to the Supreme Court of Canada, concerned the sale of ten salmon for 50 Canadian dollars contrary to state legislation by Ms Van Der Peet.⁸⁰ The claimant argued that such trade should be recognized as an expression of traditional cultural practice of her tribe, and claimed protection under s. 35(1).⁸¹ The debate was whether her right to fish was protected under the rights of aboriginal peoples. Thus, the fundamental issue for the judges was to address the question: '[H]ow should the Aboriginal rights recognised and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?'⁸² In answer the judgment stated that the rights:

... are best understood as, first, *the means by which the Constitution recognises the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies* and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.⁸³

Ultimately the Supreme Court clarified that aboriginal rights are based on two notions: first, that of original occupation prior to European settlement and, second, on cultural

⁷⁹ The fiduciary obligation refers to the duty of consultation that the Crown has when indigenous rights are involved in a decision. See Chief Justice Lamer: 'There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified', *Delgamuukw v. British Columbia*, 3 SCR (1997), 1010, 1081 DLR at 265.

⁸⁰ *R. v. Van Der Peet*, 2 SCR (1996) 507.

⁸¹ Van Der Peet must be read with the five others decisions issued in 1996 relating to similar subject; see *R. v. Gladstone*, 21 August 1996; *R. v. NTC Smokehouse*, 21 August 1996; *R. v. Adams*, 3 October 1996; *R. v. Côté*, 3 October 1996.

⁸² *R. v. Van Der Peet*, 2 SCR (1996) 507 at 299.

⁸³ *R. v. Van Der Peet*, 2 SCR (1996) 507 at 309–10 (emphasis added).

and traditional practices. This decision also emphasized that the purpose of s. 35(1) is 'to reconcile prior occupancy of land by aboriginal peoples with the Crown assertion of sovereignty'. Therefore, it could be argued that the court acknowledged the occupation of the land by the aborigines as falling under the protection of the constitution.

The court further established a test to determine how to prove the existence of aboriginal rights. This test can be summarized thus: 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'.⁸⁴ Even though this test was framed in the context of a traditional right to fish, it must be understood that the right to land is an inherent element of aboriginal rights.⁸⁵ This extension of the principle to land rights returned to the agenda of the Supreme Court in the following year with complementary legal interpretation of constitutional protection in its decision in *Delgamuukw v. British Columbia*.⁸⁶ This decision followed the claim of the 'Gitksan and Wet'suwet'en peoples' of unextinguished title over their traditional territories in British Columbia. The judgment highlighted the legal importance within the Canadian system of the collective right to land for indigenous peoples.⁸⁷ The court defined this title as that of 'exclusive use and occupation of land, including mineral rights and non-traditional uses of land' (Ulgen 2000: 148). The determination of the existence of a right to land is very different from the test set up for other aboriginal rights. The regime requires three conditions to be met for the establishment of aboriginal title. First, that the land must have been occupied prior to the assertion of state sovereignty to such land. Second, that occupation of the land be continuous though '[t]his requirement does not demand an "unbroken chain of continuity" but "substantial maintenance of the connection" between the people and the land' (Assembly of the First Nations 2000: 580, quoting the *Delgamuukw* case). Third, that at the time of the assertion of sovereignty by the Crown, the occupation must have been exclusive. The Assembly of First Nations in Canada has highlighted that exclusivity does not refer to the absence of other groups on the land, but rather 'the intention and capacity to retain exclusive control' (ibid., citing McNeil 1989: 580). In discussing use and development of such land the court stated:

If occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g. by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may

⁸⁴ For an interpretation of the meaning of such a test, see Dick (1999).

⁸⁵ Chief Justice Lamer stated that 'Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land' (1996, 4 CNLR 177).

⁸⁶ *Delgamuukw v. British Columbia*, 3 SRC (1997) 1010.

⁸⁷ Ibid. at 1082.

not use the land in such a way as to destroy that relationship (e.g. by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).⁸⁸

Such a position must be seen as a consequence of the development of general concerns for the conservation of the natural environment in Canada. The Assembly of the First Nations has endorsed this 'underlying rationale' since 'conservation concerns are consistent with indigenous values and beliefs and ultimately benefit indigenous peoples'. Even though this decision recognized aboriginal titles as being protected by the constitution the case also provided the court with an opportunity to complete the theory of the power to 'extinguish' or 'adjust' aboriginals' titles. While in the *Sparrow* decision the court decided that in case of extinguishments, the government has to show 'clear and plain intention', in *Delgamuukw* the court specified that the legislation that could infringe aboriginal title must be based on the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior, protection of the environment or endangered species, the building of infrastructures and the settlement of foreign populations to support those aims.⁸⁹ Thus, in determining legality of extinguishment of aboriginal title, the judicial power is required to assess whether the infringement has been minimal enough, whether fair compensation has been paid and, finally, whether concerned aboriginal groups were consulted before the final decision.⁹⁰

Thus, the Canadian system highlights three major issues regarding indigenous peoples' rights to land.⁹¹ First, that indigenous rights are inalienable and can only be surrendered by the Crown. Second, that indigenous titles arise from occupation of land prior to arrival of other settlers and not from any legal recognition (they are *sui generis* act). Thus aboriginal peoples have 'historical sovereignty' over their traditional lands, the proof of which is based on historical or physical occupation, and continuity and exclusivity of the occupation. Third, indigenous titles are collective and land cannot be used in a manner 'irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title'.⁹² The Canadian example shows that in the last ten years the principle of cultural relativism concerning ownership of land has had to be recognized. As Asch points out, it is important to realize that only a few years ago the exercise of governmental power on the land was 'unmitigated', while 'the current theory of Aboriginal rights seeks to balance the supremacy of State power with respect for cultural difference' (1999: 428–46).

⁸⁸ *Delgamuukw v. British Columbia*, 3 SRC (1997) 1010 at para. 129.

⁸⁹ *Ibid.* at para. 165 (Lamer CJ).

⁹⁰ *Ibid.* at paras. 167–9.

⁹¹ Canada also offers indigenous peoples the possibility of governance of their territories in Nunavut, see p. 226.

⁹² *Delgamuukw v. British Columbia*, 3 SRC (1997) 1010.

Australia

Australia provides an example of one of the most amazing contemporary disputes between legislature and judiciary powers with regard to land rights. This debate centres on a definition concerning the rights of 'native title'⁹³ holders against those of non-indigenous persons to use the land for their own interests. In this debate, the two major issues were, first, whether the annexation of territories by the government had extinguished native titles and, second, to establish precisely whose rights should be given priority – aboriginal peoples already on the land, or the incoming colonizers who were granted titles to use the land. Another focus of Australian legislation on this issue lies in the fundamental link between anti-racist legislations and land right issues for indigenous peoples. During colonial times, rules were based on the idea that white settlers had 'freehold title' over land. As a result, aborigines had no legal right to own land. However, the post-colonial period was equally turbulent due to the policy of resettlement of aborigines in reservations. In legal terms aborigines had no rights – not even the right to be part of a treaty. That could be explained by the fact that in Australia jurisdiction relating to indigenous issues was subject to provincial law while in Canada and the USA such jurisdiction was federal (see Bartlett 1999).⁹⁴ Following a referendum that gave the federal government concurrent jurisdiction over aboriginal issues, the first recognized right arose in 1970 with constitutional acknowledgement that the federal government could only acquire land on a basis of 'just term'. Judicial action based on this principle was brought before a court to invalidate the grant of mining rights on traditional lands. In the decision in *Milirrpum v. Nabalaco Pty Ltd* the court stated that the 'doctrine of communal native title' was neither part of Australian law nor part of any common law system.⁹⁵ This decision meant that valid title to land must have been granted by the Crown in direct consequence of the doctrine of *terra nullius*.⁹⁶ Under this doctrine, the Crown acquired all the land in Australia. Thus to be recognized as the owner of a land specific recognition of this ownership was required from the Crown which was impossible in view of aborigines' customs and traditions concerning land ownership.

⁹³ The term 'native title' describes interests and rights of indigenous inhabitants to land, whether communal, group or individual, possessed under the traditional laws acknowledged by, and traditional customs observed by, the indigenous inhabitants – National Indigenous Working Group Fact Sheet – Native Title.

⁹⁴ Only in 1967 did the federal government obtain concurrent jurisdiction with the states concerning aboriginal peoples.

⁹⁵ This decision was mainly based on the decision of the British Columbia Court of Appeal in *Calder* that rejected the concept of native title at common law. However, eight months after that decision, the Supreme Court of Canada overruled the decision of the British Columbia Court of Appeal.

⁹⁶ In a decision of 1889, *Cooper v. Stuart*, it was ruled that Australia had not been 'conquered' but 'settled'; 14 App. Cas. 286 (1889).

The *Mabo 1* decision followed a claim of the Meriam People against the State of Queensland, which proclaimed that some of the islands vested by the Crown, where the Meriam peoples used to live, were 'free from all other rights, interests and claims of any kind whatsoever'.⁹⁷ In this decision, the High Court decided that the Act established by the State of Queensland did not comply with the Racial Discrimination Act 1975⁹⁸ as such legislation denied the principle of equality before the law of the Meriam people. This first decision was a pre-revolutionary link wherein discrimination and right to own land was clearly made, but the court did not determine if aborigines had rights over land. The better-known *Mabo* decision came in 1992 and was the first recognition of native title (on an anti-discrimination ground). In the first instance, the decision recognized the existence of native title in common law. One of the consequences of this acknowledgment was that until explicit appropriation by the Crown, native title endured. Second, if native title was subject to extinguishments, such a procedure, if completed after 1975, had to comply with equality before the law as enacted by the Racial Discrimination Act. The existence of native title itself is based on two factors, 'exclusive occupation' of the land, and the content of the title as given by customary aboriginal laws (McNeil 2000 and 1997b: 117). Thus, native titles are distinguished from statutory land rights which:

... flow from the Crown under legislation, similar to freehold and leaseholds titles. Native Title is not a grant created through legislation ... [but] ... comes from indigenous law and custom which pre-exists the Crown.⁹⁹

This decision is famous for its legal rejection of the principle of *terra nullius* which was deemed outdated, inappropriate and discriminatory. Nevertheless, titles acquired by white settlers during the period when *terra nullius* was law were still considered valid. Such rejection thus had no effect in relation to the past (Bartlett 1999: 413), but the importance of this decision was to specify that indigenous rights do not disappear in case of settlement. As every legal 'revolution' carries some clauses of attenuation, the court specified that native title 'is a form of permissive occupancy at the will of the crown', thus extinguishments do not require specific compensation when carried out in the interest or the will of the nation.

Following the *Mabo* decision there was an important debate in Australia. Even though this decision was not perfect recognition of the right to own land for aborigines, public reaction was governed by the impression that aboriginal rights were overprotected by it. This reaction was mainly orchestrated by mining companies and others business interests.¹⁰⁰ The legal result of such 'unfounded

⁹⁷ Queensland Coast Islands Declaratory Act 1985.

⁹⁸ This Act is the implementation of the ICERD in Australian law.

⁹⁹ National Indigenous Working Group Fact Sheet – Native Title.

¹⁰⁰ For an illustration of such an orchestration by mining companies, see Australian Mining Industry Council, Advertisement, *West Australia* 14 August 1993 – a campaign that asked 'Is

fear'¹⁰¹ was the passage of a new bill before parliament, namely the Native Title Act 1993, which recognized immunity for freehold and other titles from native title claims. Where other titles were threatened by the existence of native title, the Act recognized the legitimacy of all the Crown grants made before 1 January 1994. This Act also specified that if dispossession had taken place before 1975, aborigines were not allowed to claim title to their traditional land. It further stated that pastoral grants of mining interests suspended native title until the mining interest expired. The Act also recognized a right to negotiate over development on native title lands.¹⁰² When allowing exploitation on native land, the government was required to notify native title holders, and an agreement made in 'good faith' had to be elaborated between the parties.¹⁰³

In *Wik People v. State of Queensland*¹⁰⁴ the High Court was invited to resolve the crucial question of the relationship between the right of pastoral leases and native title.¹⁰⁵ The people of Cape York claimed ownership of their traditional land which was controlled by pastoral leases. Thus the issue was to define whether such grants of pastoral title were able to extinguish native title. This question was of immense importance since 42 per cent of all Australian land is held under pastoral leases. The majority of the court decided that the grant of pastoral leases under the Queensland Land Acts 1910 and 1962 did not 'necessarily extinguish all incidents of Aboriginal title'. This decision went beyond simply defining the relationship between native titles and pastoral leases and aspired for equality of status between any title over the land and native titles.¹⁰⁶ Therefore, native title fell in the same category as every other title and, as a result of this decision, when the Crown wished to confiscate land owned by aborigines it was no longer a question of extinguishment but rather a general

this really one Australia for all Australians? . . . The Australian Mining Industry is not opposed to Aborigines being granted titles . . . But we believe all Australians should have the same rights over these titles'; as quoted in Bartlett (1999: 417).

¹⁰¹ This expression was used by Hill (1995: 306) to describe that overreaction – 'Unfounded fear of "Aborigines claiming your backyard as traditional lands" spread among the general public'.

¹⁰² 'The statutory right to negotiate provisions of the Native Title Act provide a process to deal with compulsory acquisition of lands for the benefit of a third party. It applies to resource development and land use affecting native title. It strikes a balance between the rights and interests of native title holders and those resources developers'; National Indigenous Working Group on Native Title, Fact Sheets.

¹⁰³ Native Title Act, ss. 26–44.

¹⁰⁴ *Wik People v. State of Queensland*, 141 ALR (1969) 129.

¹⁰⁵ 'A pastoral lease gives the lease-holder the right to use the land for pastoral purposes, including raising livestock and developing infrastructure necessary for pastoralism – fence, yards, bores, accommodation, etc.'; National Indigenous Working Group on Native Title, Fact Sheets.

¹⁰⁶ Pastoral leases were a Crown grant.

question of expropriation.¹⁰⁷ The relationship between pastoral leases and native title is governed by the theory of 'co-existence'. Thus grants of pastoral leases were not considered to have extinguished native titles nor are they considered to have effected expropriation of such titles. However, the Court also defined that leaseholder rights prevailed over native title in cases of 'inconsistency'. Some commentators have highlighted that a direct consequence of the *Wik* decision is 'that where a subsisting native title right is inconsistent with another interest validly granted by the Crown, the other interest will prevail over native title to the extent of the inconsistency' (Dick 1999: 68). Thus native title is considered inferior to other grants if inconsistent with those grants. To determine the inconsistency, the test set up in *Wik* is based on whether the native title can be exercised without altering the grant. If alterations are created, the native title has to be considered legally extinguished. However, this decision left both communities, the aboriginal as well as the non-indigenous community, unsatisfied and as a result the issue of co-existence remained unresolved.

The government proposed a 'Ten Point Plan' for adoption by parliament, most of which was adopted under the Native Title Amendment Act 1998. The principal provisions of this amendment are the validation of acts or grants made between 1994 and 1998 (confirmation of past extinguishments), removal of rights to negotiate over acquisition of native title in cities and removal of the government obligation to negotiate in 'good faith'. The amendment also includes a list of grants that extinguish native titles permanently (freehold, commercial leases, exclusive agricultural/pastoral leases, residential leases) (Schiveley 2000: 427). The Act also expands the rights of pastoralist leaseholders by diversification of activities allowed (cultivation, fishing, forestry, aquaculture, off-farm activities, and so on).¹⁰⁸ Even though, the amendment includes a reference to the application of anti-discriminatory legislation, in 1999 the CERD observed that some of the provisions of the Act 'extinguish or impair the exercise of indigenous title rights and interests and discriminate against native title holders'.¹⁰⁹ The CERD also noted:

... in particular, four specific provisions that discriminate against indigenous title holders under the newly amended Act. These include the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and the restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.¹¹⁰

¹⁰⁷ One of the legal consequences of such an evolution is that the Crown needs to show 'clear and plain legislative intention' to expropriate and such measure must be based on a just compensation.

¹⁰⁸ For a complete understanding of the content and the validity of this amendment, see Triggs (1999: 372).

¹⁰⁹ CERD, Findings on the Native Title Amendment Act 1998 (Cth), UN Doc. ERD/C/54/Misc.40/Rev.2 (18 March 1999), para. 21. CERD expressed concern over the compatibility of the amended Native Title Act 1993 ... with Australia's international obligations under the ICERD.

¹¹⁰ CERD expressed concern over the compatibility of the amended Act with arts. 1(4), 2 and 5 of the convention, in particular, that the principle of non-discrimination applies to the 'right to own property alone as well as in association with others'.

Thus the CERD found that the amended Native Title Act was in breach of the convention since it appeared 'to discriminate on the basis of race to the significant detriment of indigenous peoples and thus to breach the Racial Discrimination Convention and international law in other respects'.¹¹¹

The judicial debate concerning native titles is most evolved in Canada and Australia where significant developments with regard to adoption of legislation have taken place during the past two decades. While judicial settlement seems too insufficient, it remains extravagant to ask a court to determine the structure of the negotiation between aboriginals and settlers – to determine the structure of future relationships and what is ultimately required to resolve these issues (Schiveley 2000: 11). The establishment of political dialogue and negotiation before litigation in court is certainly preferable in resolution of land issues; moreover it leaves the courts as a last resort if negotiations fail. Thus, even though legislative innovations during recent decades are important, the evolution of political dialogue between indigenous representatives and governments on land rights merits deeper attention. To protect their specific relationship with the land, indigenous peoples are sometimes given a degree of governmental representation but this can vary significantly. In Scandinavia, for example, the Sami have a representative parliament that can invite national parliaments to take cognisance of indigenous issues. In other countries, indigenous peoples' rights to land are recognized via a degree of autonomy with regard to the management of territory. For example, in Greenland and Canada, the Inuit have access to a more developed system of self-governance.¹¹²

The Sami¹¹³ peoples, formerly, the inhabitants of Lapland, are divided between the boundaries of Norway, Sweden, Finland and Russia.¹¹⁴ Nowadays, in their relationship with the governments of Norway, Sweden and Finland, their situation is almost similar; in these three countries they have political expression within the 'Sami parliaments' which are advisory bodies to national parliaments and propose legislation regarding

¹¹¹ On the validity of the amended Act with regard to the Convention on the Elimination of All Forms of Discrimination, see Triggs (1999).

¹¹² For a general overview concerning the current situation of the Inuit, see 'Indian and Northern Affairs Canada', *Inuit in Canada*, <<http://www.inac.gc.ca/pubs/information/info.16.html>>. See also <<http://www.innu.ca>> or <<http://www.nunanet.com/~jtagak/resources/>> (consulted 27/08/01).

¹¹³ There are several appellations for the Sami, they call themselves 'Saemi', 'Sápmi', or 'Saa'm'. In the literature the terms 'Sámi', 'Saami' or 'Same' are also often used; see Craig and Freeland (1998). The Sami were referred to as Lapps but after many years of campaigning by Sami representatives this term, considered derogatory, was changed.

¹¹⁴ The Sami population is estimated to be roughly between 75 000 and 100 000, between 40 000 and 60 000 are in Norway, 20 000 in Sweden, 6500 in Finland and the rest in Russia. As there is no representative Sami parliament in Russia, these comments only apply to Norway, Sweden and Finland.

Sami issues.¹¹⁵ However, it is important to note that the Sami parliament does not have any role on the issue of ownership rights. In this regard, the Sami experience in Scandinavia highlights that granting a certain degree of political representation before, or without, domestically recognizing rights to land is illusory. Even though it is very important that indigenous peoples have political voice within their states, the land rights issue is of such importance that today in all these countries the political situation is frozen by the lack of development on this crucial issue.

The Inuit live in four areas: Canada, Alaska, Russia and Greenland (see Nuttall 1994).¹¹⁶ In 1992, in Northern Canada an 'Aboriginal-governed territory' called Nunavut was created after 15 years of negotiation between the government and the Inuit of the Northwest Territories.¹¹⁷ The Canadian federal parliament has delegated territorial powers to the public government of Nunavut. Via art. 19 of the agreement between Canada and the Tungavik Federation of Nunavut, lands within the new territory are established as 'Inuit-owned'. Such ownership is seen as a way of providing and promoting economic self-sufficiency. The title is owned collectively and vested in the Nunavut government. Thus the situation in Nunavut presents a good example of the manner in which states can deal with indigenous peoples' rights to title to territory.

Conclusions

The argument often made in discussing issues of the rights of indigenous peoples to title to territory is that preference should be given to political discussion rather than judicial litigation.¹¹⁸ However, while general rules cannot be inferred from the Inuit example it does reveal a model of a viable land management strategy within a demarcated territory without threatening the fundamental unity of the state. As Special Rapporteur Cobo has stated:

Diversity is not, in itself, contrary to unity, any more than uniformity itself necessarily produces the desired unity.

(Cobo 1983: 54, para. 402)

¹¹⁵ The Sami have always tried to maintain a relationship between the Sami populations in the different countries. The Sami Council is an NGO that represents all Sami (it has NGO status within the ECOSOC system). Since 1986 they have a common flag and a national anthem. The first Sami parliament was created in Finland in 1973, the second in Norway (1989) and the third in Sweden (1993).

¹¹⁶ The political situation of Greenland is still evolving, with access to independence in the near future; see <<http://www.gh.gl/>>.

¹¹⁷ Administrative difficulties delayed the official separation to April 1999.

¹¹⁸ Such political dialogue is also a sign of the end of the 'paternalist' approaches of most western societies; approaches that were racist and destructive for indigenous societies via the notion of guardianship in issues governing land rights.

International law as regards land rights of indigenous peoples is underdeveloped in comparison to national laws. The ILO Convention remains the only legally binding instrument specifically addressing this issue. Even though general protection is afforded by human rights law, this is only a protection by default. The national legislations of Canada, Australia, Finland, Norway and Sweden all point towards an evolving body of international customary law. In these countries national legislation has evolved because of international pressure. In all the case law studied explicit references to international law were made and such case law was of crucial importance for the evolution of national legislation. Even though international law regarding indigenous land rights is not strong, state practice reveals that judges have the belief (*opinio juris*) that a change in their national legislation dealing with land rights is necessary as regards indigenous peoples. Therefore, international customary law as both practice and *opinio juris* seems to exist in the international arena. Since the land rights issue is a primary issue for indigenous peoples there remains great scope for the evolution of international norms in this respect. Triggs (1999) summarizes four salient points pertaining to existing international law regarding the indigenous land rights issue. Building on this, national legislations and international law could be said to have evolved in four main directions:

- 1 Recognition and protection of the relationship between indigenous peoples and land as indicated by joint arts. 1(1) and 1(3) of the 1966 Human Rights Covenants.
- 2 Indigenous peoples have 'some rights to own land in association with others and to inherit that land', as provided by the principle of non-discrimination under ICERD.¹¹⁹
- 3 Indigenous peoples have a right 'not to be discriminated against on the basis of race and to have the benefit of law to ensure substantive equality' as given by art. 1 of ICERD.
- 4 Law has to clearly stipulate that 'where a government acts in relation to indigenous title it is bound to ensure participation in the decision through full and bona fide consultation with, and in some instances, through the consent of, the indigenous peoples concerned and to provide full compensation where their rights are adversely affected'.¹²⁰

Nevertheless, it is important to keep in mind that even when such rights are theoretically recognized by national legislations, their practical implementation is always very different. In the words of Moses, the Grand Chief of the Grand Council of Crees:

¹¹⁹ For text and references of those instruments, see E/CN.4/Sub.2/2000/25, Annex.

¹²⁰ This discussion was central to debates at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, September 2001. This conference might be another forum for indigenous land claims. See <<http://www.un.org/rights/racism/>>.

Under this system, and as exemplified by Canada, it is the aboriginal peoples who must attempt to claim back from the state the lands we have lived on for thousands of years. And it is the state which determines the validity and extent of the claim and its final resolution. The baseline or starting-point in this process is total dispossession. The onus is upon the indigenous peoples to prove their indigenous ancestry, their original possession, and the extent of the use of their lands and territories. It is the state that makes judgement, and it is the state that is the ultimate beneficiary. Finally, in perhaps the most confounded and convoluted contradiction of all, the indigenous peoples must surrender to the state their aboriginal title in order to have title to their meagre remainder confirmed through treaty by the state. The alleged objective is to provide the state with some guarantees of 'finality' and 'certainty'.

(Moses 2000: 167)

In the future it is clearly essential to recognize the importance of the land rights issue for indigenous peoples. If there is no progress on this issue, international law will be unable to offer adequate protection, thus rendering previous declarations of concern expressed by the international community as empty rhetoric. It is clear that such development must be carried out in the face of a 'global market' that commercially values indigenous lands and seeks acquisition of territories where natural wealth is concentrated. Thus there is a real threat of increase in the claims of states, multinational companies and indigenous peoples for ownership of these territories. In this potential battle indigenous peoples in their precarious position are particularly poorly protected. As stated by Rapporteur Daes, 'the gradual deterioration of indigenous societies can be traced to non-recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other fundamental human rights' (Daes 2000: 3).

8 Conclusion

One of the preconditions inherent in the definition of a state in modern international law is that it will have a defined territory.¹ This single concept is enshrined as one of the main conditions concomitant to statehood and is given by the Montevideo Convention 1933.² For most sovereign states this condition is apparent enough, yet the process of colonization has rendered the notion of territory in some entities extremely problematic.³ Modern international law has been slow to address these notions of territoriality since it is framed from a particular perspective that has not been forced to consider these kinds of issues.⁴ Rather, in seeking to address the growing spate of violence induced by conflict over territory it has invoked legal notions that were first developed during the Roman era. Roman property regimes and their resultant principles, notably *uti possidetis juris*, have been applied and reapplied in different contexts to become the problematic bedrock of the treatment of territory within modern international law.⁵

The work undertaken in this book involved the questioning and critical analysis of some of the basic underlying assumptions inherent in the transmission of the doctrine to modern situations. For this purpose it started by setting out the manner in which the doctrines of *uti possidetis* have come to be interpreted in modern international law. This initial chapter laid down the basis against which the intertemporal development of the law was then examined. However, as has been established, the actual treatment of *uti possidetis juris* in contemporary international law is far removed from its original development as an interim mechanism available to the praetor under Roman private law. Chapter 2 examined these contextual nuances of the norm vis-à-vis its original application within Roman jurisprudence in a bid to assess its relevance towards transposition into international jurisprudence by classical jurists such as Gentili and Vattel. Initially applied as an equitable principle that informed the rulings of the Roman

¹ For a treatment of territory in international law, see Jennings and Watt (1992: 563–718).

² Article 1, Montevideo Convention 1933 states: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.'

³ As can be seen in liberation movements in countries such as India, Nigeria, Sudan, Indonesia and the Philippines.

⁴ For the impact of western notions, see Mazrui (1975).

⁵ For a general reading on *uti possidetis*, see Ratner (1996), Shaw (1996) and Castellino and Allen (2000).

praetor in disputes between individuals over a possession, it assumed that the possessor of a disputed property would be considered its owner in the interim while the claimant had to demonstrate his⁶ case against them. However, when transmitted into international law this basic principle was called upon to justify the boundaries left in Latin America by the Spanish and Portuguese as they were defeated in the face of the Creole liberation action.⁷ In the interests of order the Creoles decided that the doctrine of *uti possidetis* would be most appropriate. They interpreted this doctrine to mean 'as you possess so you possess' and when applied to the unfolding decolonization of Latin America it was considered to validate the boundaries left behind by the colonial powers, which the new incumbents to power decided by consensus not to challenge. The result was that former administrative boundaries within the Spanish Empire were transformed into international frontiers with the same technical sanctity afforded them that was bestowed upon historical negotiations of territory between sovereigns in Europe. The guarantee of these boundaries benefited the Creoles for a number of reasons, most of which could be attributed to the maintenance of order in a period of transition. Attendant to the use of the doctrine of *uti possidetis* in this context was the development of another important and extremely vital concept. This concept was that of *terra nullius* and the resonance of it pertained to the acquisition of territory. International law, as it had developed at the time, was clear that only unoccupied territory could be legally acquired (Jennings and Watt 1992: 567). All other acquisition of territory would need to take place via other means existing within international law, such as cession or treaties of accession. This doctrine was essentially set up to prevent wide-scale acquisition of the territory of one state by another – which would be to the detriment of international order. While the colonization of America had already taken place in contravention of this prevailing principle, past actions were prevented from being judged against the contemporary standard by use of the rule of intertemporal law. This rule is vital to the dynamics of international law since it deems that all actions need to be judged in the strict temporal context in which they occurred, so as to prevent the retrospective application of more modern ideas to activities that took place before their development. The prime aim is to prevent the finding of past injustices against the vagaries of legal evolution. Thus while the colonization of the Americas was beyond the scope of international law, the Creoles, in seeking to ensure that Latin America would never be the victim of further European colonization, sought to rein in the principle of *terra nullius* by declaring that there was no such territory in Latin America. By this statement they inferred that all territory in the continent came within sovereign jurisdiction of an existing power. These concepts were sanctified in numerous treaties

⁶ In Roman law women did not have any rights to property due to their status in society as 'minors'.

⁷ For a general reading on the contribution of Latin America to international law, see Alvarez (1909) and Woolsey (1931).

and were even included in the Monroe Doctrine of 1823.⁸ However, the use of this terminology by the Creoles was essentially flawed since in claiming the territory without the acquiescence of the native peoples of Latin America they had implied acceptance of it as *terra nullius* before their own arrival and therefore capable of their own occupation.⁹ Nonetheless, in sanctifying interpretation of the doctrines of *terra nullius* and *uti possidetis* and seeking to crystallize them within international law with reference to regional custom, it could be argued that the doctrines themselves came to signify a particular meaning relevant to Spanish decolonization. These events took place towards the middle and latter stages of the nineteenth century and, it could be argued, reflected the standards developing in international law against notions of conquest, occupation and colonization of international territory.

Despite these developments, further colonization did take place. Unable to turn west to colonize, the imperial powers of Europe competed against each other in seizing territories elsewhere (see Pakenham 1991). The worst affected was the continent of Africa where in a frenetic swoop towards the end of the nineteenth century, the European powers began the process of carving out and demarcating territory between themselves armed with the philosophy of the 'three Cs' – civilization, Christianity and commerce.¹⁰ Chapter 4 analysed the process by which this philosophy was accompanied by various international legal developments wherein the powers sought to agree between themselves and justify their action by recourse to various principles of public international law. This process was largely achieved by means of 'treaties' of dubious validity in international law, with spurious and sometimes fraudulent entitlements (Touval 1969). Nonetheless since the powers themselves remained the ultimate gatekeepers of international law the process remained skewed in their favour. However, with decolonization gaining steam in the face of the self-determination movements of the UN era, these colonies gradually began to unravel (see Sureta 1973). The situation was now similar to that faced by the Spanish in the face of Creole action, and once again the response was dictated by the need to preserve order. The process of division of territory in Africa had been informed in most instances by nothing more than a desire to restrict the influence of a rival's jurisdiction and rarely pertained to naturally occurring fault lines, nor to tribal or traditional custom.¹¹ As a

⁸ For general reading on the Monroe Doctrine, see Hughes (1923) and Jessup (1935).

⁹ For the significance of *terra nullius* in international law, see Jennings and Watt (1992: 564).

¹⁰ For more information, see Gann and Duignan (1969–75) Vol. 1 and Flint (1988).

¹¹ In the words of Lord Salisbury: 'We [the colonial powers] have engaged . . . in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were'; as cited by Judge Ajibola, *Case concerning the territorial dispute (Libyan Arab Jamahiriya v. Chad)*, ICJ Reports (1994) 6 at 53.

result, African administrative territories that 'belonged' to the various powers seldom corresponded to pre-colonial dimensions of past kingdoms or tribal lands. In the negotiations that took place between two or more European powers over territory that they did not know or understand, they cut across all kinds of traditional divides.¹² When it was time to decolonize the same principles that informed the Spanish withdrawal in Latin America were called upon and thus, via the principle of *uti possidetis*, these random and problematic administrative boundaries took on the sanctity of international frontiers. While this was, in most instances, conducive to peace, security and order in the short-run, it proved extremely difficult to sustain. As a result, a spate of violent renegotiations began, starting with the actions in Katanga and Biafra. The Organization of African Unity, the regional body, was extremely concerned by these threats to statehood and adopted the strongest terms by which to protect the territorial sovereignty of states.¹³

Problems concerning territoriality and its allocation persist, as can be seen in the numerous cases brought before the International Court of Justice as states seek delimitation of boundaries that pertain to historical allegiances against the weight of rigid and alien principles such as *uti possidetis*. Eight of these cases have been reviewed in the fifth chapter of this book to analyse the extent to which states recognize and comply with the doctrine of *uti possidetis* and also to examine the means by which they seek to justify their positions against this doctrine. The pleadings to these cases are rich material for the presentation of alternative histories of these territories, which reveal various intricacies that remain unaccommodated within the rigid treatment of territory in international law. Also included in various cases are the pronouncements of the jurists of the ICJ and their analysis of the doctrines and the manner of their application in the different contexts. One of the major problems with this particular regime of redressal is that it remains closed to non-state actors. Yet it is non-state actors who are in the forefront of the renegotiation of territorial rights. Modern international law has come a long way since its acceptance of the discourse as being purely one that governed relations between states. Indeed non-state actors have an increasing role to play within international society, whether in the form of international NGOs,¹⁴ pressure groups¹⁵ or national liberation movements.¹⁶ Yet the ICJ in its current

¹² See the Libyan pleadings in the *Libya–Chad case*, ICJ Reports (1994) 6, Libyan Written Pleadings at p. 88 para. 4.46.

¹³ Resolution 16(1) of the OAU Assembly of Heads of State and Government at Cairo in July 1964. This provided that 'all Member States pledge themselves to respect the borders existing on their achievement of national independence'; cited in Brownlie (1971: 360–1).

¹⁴ For example, Amnesty International and Human Rights Watch play a significant role in the perpetration and monitoring of worldwide human rights standards.

¹⁵ For example, child rights NGOs have been allowed to participate in the discussions of the Committee for the Rights of the Child.

¹⁶ The Palestinian Liberation Organization was granted observer status in the UN General Assembly on 22 November 1974; see General Assembly Resolution 3237 (XXIX).

format is unable to accommodate the interests of these groups even if they represent those most affected by the doctrinal injustices of the past. In addition, the mechanism of the ICJ, structured as it is to adjudicate disputes *between* states, fails to provide remedies in *intra*-state conflicts over territory. The last two chapters of this book have focused on two such contemporary situations within states, where issues of the title to territory were raised and required clarification.

The first situation examined concerned the break-up of the former Yugoslavia. This conflict dominated international attention for much of the 1990s and initially began as a movement within the state of Yugoslavia by which different groups within the federal state sought to protect and strengthen their position in the face of growing ethnic identification. However, this process was overtaken by events that unfolded at a frenetic pace. As a result the body set up by the European Commission Committee on Yugoslavia to draw up a new constitution that would accommodate the different peoples of the state within a new structure was forced to 'creatively interpret' its own role (Terrett 2000). Thus the Badinter Arbitration Commission that had been set up to negotiate with different powers in the disintegrating state in a bid to agree on a constitution that would benefit and protect the rights of the different peoples was forced instead to rule on issues of territoriality within modern international law. This change of role was essentially brought about by the speed of events that ruled out the possibility of accommodation within the state and instead saw the creation of new states from the six republics. Once again order was threatened, and the commission responded by professing the doctrines of *uti possidetis* in seeking to sanctify administrative boundaries within the former Yugoslavia. This process was accompanied by numerous problems, partly a result of the changing role of the commission itself, but the opinions of the commission, nevertheless, present a modern interpretation of the doctrines governing the treatment of territory in international law.

The second contemporary situation examined focused on the intricacies of the treatment of territory in a completely different setting. While studying different territories and different eras, it is easy to ignore, as has been done in the creation and sustenance of the sovereign state, indigenous peoples who have lived largely uninterrupted in particular territories. These peoples, sometimes oblivious to systems that are developing around them, are suddenly required to conform to alien systems for their possession of their land to be recognized internationally. In addition, more often than not, their right to the land that sustains them has been overridden by the propagation of settlers and settlements that contradict their ethos and render them bereft of the basic rights that they have been exercising for centuries. Modern international law and its accompanying principles have been unable to penetrate this area of law since it has traditionally come within the strict purview of the mandate of the sovereign state, even if that mandate was not necessarily achieved taking into account the rights of these indigenous peoples. Thus, the situation in many states with indigenous peoples is more akin to the issues concerning Creole action in Spanish America than the classical vision of self-determination that is synonymous with the

romantic notions of decolonization in the UN era.¹⁷ Even in that particular era, the rights of indigenous peoples and other peoples who were in a non-dominant position within the transfer of power were rendered voiceless. Thus the final chapter sought to examine the issues concerning indigenous peoples through the lens of different instruments of international and national law. In this sense the book has sought to present a chronological analysis of the issues that have shaped doctrines governing territoriality in international law and to examine them against the growing norms of human rights and entitlements within modern international law.

One of the most important purposes of this exercise concerns the analysis of the issue of the intertemporal rule. Past injustices such as colonization are usually protected from intense scrutiny by modern international law through this rule. The rule itself needs to be commended since it would clearly be unjust to seek to project a more progressive notion of law and its underpinning morality onto the actions of the past in a bid to seek culpability. This would violate basic legal entitlements against retrospection in contradistinction to revisionist notions. While the validity of revisionist notions is being questioned in other forums, it is not the purpose of this book to question the rule itself. Rather the purpose of this book is to demonstrate the extent to which the rule is incoherently and often inappropriately applied to situations governing the treatment of territory in modern international law. If it is argued that the actions of the imperial powers in annexing territories in Africa in the late nineteenth century are beyond culpability since they ought to be subject to the intertemporal rule, then the temporal context of that time bears examination. It is in this quest that the decolonization in Latin America provides the appropriate temporal context. By analysing and discussing notions that concerned not only territoriality but also the manner of conquests of colonies it could be argued that the tone had been set, in customary international law at least, for the development and further solidification of norms of international law against wanton conquests and annexation of territory. Although the norms had developed to this extent and were considered appropriate in Latin America, they were nonetheless either held to be invalid or disregarded on purpose in the colonization of Africa. Indeed the situation was compounded by blatant violation of the norms governing the signing of 'treaties' as European powers sought to challenge each other in a bid to accumulate colonies in the continent. Further, in decolonizing these territories the need for 'international' order was considered so sacrosanct that it overruled the history and geography of the post-colonial entities. Rather than accommodating and negotiating with the diverse peoples that came within the rigidly defined territories, the simplistic decision was taken to maintain colonial boundaries, an action that was bound to have longer term implications. This action, while nearly universally accepted by western-trained state leaders in Africa, failed to accommodate non-state actors who sought to gain legitimacy by seeking statehood themselves. The result has been numerous so-called conflicts of 'post-modern

¹⁷ For notions of classical and romantic self-determination, see Koskenniemi (1994: 249–51).

tribalism' (Franck 1993: 3) as attempts are made to reformulate artificial colonial boundaries (of significance for only fifty years or less) along more historical lines.

While the application of the doctrine of *uti possidetis*, which solidifies the sanctity of colonial boundaries, does allow change in the face of consent, it is important to stress that this consent is required between existing sovereign states. Non-state actors have no explicit right to demand territorial adjustment even though the right to self-determination is enshrined as the first and foremost right in the two international covenants of 1966 that are the blueprint for the human rights regime. Thus existing states have sought to minimize the impact of the right of self-determination by declaring it as a right that only exists in an 'internal' guise. While notions of international order are to be cherished, the offer of autonomous regimes to groups that fail to see why they should exist within an externally defined unit for the sake of the historical convenience of a colonial power remains difficult to resolve. The fact that this historical convenience is in some cases further perpetrated by neo-colonists who fail to represent the inhabitants of a given territory serves only to aggravate the situation. This can often result in aggrieved and unrepresented peoples within a state seeking secession and in bid to access the international right to self-determination these groups attempt to pierce the veil of domestic sovereignty and internationalize their conflicts with their respective state governments.

Thus in summarizing the propositions of this book the following points can be made.

- 1 International law governing territoriality is premised on private law notions that emanate from Roman property regimes attributable to *jus civile* and *jus gentium*. These notions were applicable to the treatment of immovables when disputes arose between two or more parties with regard to possession of a given property. Accordingly the praetor ruled on interdictory proceedings wherein interim possession of the property would be given to the existing possessor while the claim of the aspirant was examined.

- 2 The Creole action in Latin America sought to apply this concept to sanctify boundaries inherited from colonial regimes in a bid to prevent the disintegration of these units. It was felt that such disintegration would hamper immediate development. In seeking clarification of these terms in international regional custom, the Creoles sought to codify other principles of international law too. One of these is the notion of arbitration to settle disputes, which has had some resonance in the determination of title to territory. The other concept that has been more important from the perspective of this examination of principles in international law is the consolidation of the denial of the notion of *terra nullius*.

- 3 It could be argued that the Creole action and subsequent continent-wide discussions and treaties emanating from the New World with regard to the treatment of territory

were an indication of existing customary international law. In this context it needs to be stressed that the Creoles were not the first to discuss the notions of the occupation of territory. The laws governing the acquisition of territory had already been in place prior to the Creole action. This action merely strengthened norms such as *terra nullius* and refocused them within the remit of international law.

4 In annexing territories in Africa, the imperial powers sought to justify their action by recourse to domestic laws as well as international legal principles. However, the principles in acquisition of territory were selectively applied and, as a result, even though an international conference such as the Berlin West Africa Conference of 1884–5 took place, the competitive nature of the quest prevented any real crystallization of consensus on issues governing the treatment of colonial territory. As a result, the acquisition of territory in Africa became an adversarial exercise wherein one power sought to outdo its rivals in making territorial claims. These claims were based on notional occupation and spurious ‘treaties’ that defeated principles of international law at the time.

5 The argument that the actions of the colonial powers in Africa are beyond reproach within international law is justified by application of the intertemporal rule. This rule of law states that actions of a given era must only be judged against the standards prevailing in that era and not by modern more progressive standards. It is argued that the standards prevailing at the time of the ‘Scramble for Africa’ could be viewed comprehensively under the guise of the legal tenets expressed in treaties signed in Latin America; and they clearly reveal the extent to which the laws governing treatment of territory had already developed. Therefore in wilfully choosing to disregard these laws, the colonial powers ought not to be able to claim refuge under the intertemporal rule.

6 The International Court of Justice has reiterated the importance of order in delivering its judgments. In this context it has validated the doctrine of *uti possidetis* and applied it in various cases, using as the ‘critical date’, the departure of the colonial power. Yet in doing so, it has admitted that the maintenance of these regimes is based on uncertain colonial legal regimes and that there is a revisionist quality about the doctrine itself. In the course of different pleadings, the court does seem to reveal a strong western bias which treats territory as a possession belonging to a sovereign even where that possession could not be justified as being *de jure* at that time. The court is also extremely restricted in the number of cases it can try based on the acceptance of its jurisdiction and the fact that non-state parties cannot access it. The recent proliferation of cases might suggest a change in the attitudes of state parties towards the court but this remains difficult to justify at this stage.

7 The Badinter Opinions, especially the so-called ‘Badinter Principles’, are instructive on the development, application and dangers of modern notions of territoriality.

Commissioned to work with disputants in Yugoslavia in a bid to create a multi-ethnic constitution, the Badinter Commission's work quickly exceeded its mandate. Nonetheless, being the prime legal organ in place during the conflict, it was asked for its opinions on various matters. While the Opinions are ridden with difficulties, some scholars have backed the expression of the Badinter Principles. These principles support the sanctity of boundaries and their inviolability. There is also explicit support for the doctrine of *uti possidetis* in the Opinions even though it had hitherto only been used in the context of decolonization. The rigidity of the boundary regime in the former Yugoslavia, where the sanctity of boundaries was held irrespective of ethnic fault lines that were still in the process of being negotiated, led to numerous conflicts that continue to remain a threat to longer term order, even if in the short-term the threat appears to have been alleviated.

8 The people with the best claim to territory remain those of indigenous origin. Not having had to claim territory in the manner that is inherent in settled cultures, their failure to assert this right was taken by the settlers as proof that the territory they inhabited was *terra nullius*, and on those territories regimes were built that excluded their original owners. This was either justified on the basis that the peoples were not socially and politically organized enough to dispel the notion of *terra nullius* and thereby save themselves from occupation, or assuaged by the signing of unequal treaties that would be of dubious value in modern international law. These indigenous peoples have tried to seek redress through international mechanisms for the protection of minority rights, but their claims are particularly different because of the thrust of the territorial element that is contained in them. While this claim might be seen as evidence that they now subscribe to similar notions of territoriality as the settled communities upon the lands, in most cases it is in fact simply a call to be able to claim in the settled sense, the territory that was traversed by their forefathers; the rights to which have been lost in obscure legal regimes to which they did not subscribe.

Modern international law as a discourse is premised upon notions of justice and order. While it is imperative that a legal regime protect the interests of order, to do so at the cost of justice suggests the interplay of political elements. While it is impossible to separate the legal from the political it is important to stress that the legal may contain an inherent political element. If this assertion can be accepted, it also suggests that the doctrines that have been rigidly interpreted as strict laws should be examined against the different contexts in which they have been developed and subsequently applied. To apply a concept that was incorrectly transposed from the obscure confines of Roman private law governing a dispute over immovable property to sanctify colonial boundaries is problematic in itself. To alter the doctrine to suggest a new rigidity strictly applicable to colonial situations is to aggravate the grievance. However, this now largely flexible and broad doctrine has been applied to non-colonial situations by the Badinter Commission in its Opinions on the disintegration of Yugoslavia. What is

particularly problematic about this application is the manner in which the commission accepted it as a universally accepted rule that was to govern every situation in which new entities would come to power. Selectively quoting from the *Burkina Faso/Mali* case, it ignored the basic premise that the doctrine was applicable only in the post-colonial context. Meanwhile, the negotiation for land rights by indigenous peoples continues unabated, with sporadic progress due to the territorial nature of the sovereign state. Modern international law is largely helpless in assisting this cause and thus despite pronouncements regarding the right to self-determination and non-governance by foreign domination, the discourse is unable to penetrate the facade of domestic sovereignty that governs these causes. This has severely hampered the treatment of land rights and, as a result, they remain open to the vagrancies of particular state policies whether through the misapplication of the right as in the 'land reform' movements in Zimbabwe or in the continued denial of land rights to indigenous peoples worldwide.